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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

WESTERN WATERSHEDS PROJECT;)
NATIONAL PRESS PHOTOGRAPHERS)
ASSOCIATION; and NATURAL)
RESOURCES DEFENSE COUNCIL;)

Case No. 15-CV-169-SWS

Plaintiffs,)

vs.)

PETER K. MICHAEL, in his official capacity)
as Attorney General of Wyoming; TODD)
PARFITT, in his official capacity as Director)
of the Wyoming Department of Environmental)
Quality; PATRICK J. LEBRUN, in his official)
capacity as County Attorney of Fremont)
County, Wyoming, JOSHUA SMITH, in his)
official capacity as County Attorney of)
Lincoln County, Wyoming; CLAY KAINER,)
in his official capacity as County and)
Prosecuting Attorney of Sublette County,)
Wyoming;)

Defendants.)

**[PROPOSED] BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFFS**

INTEREST OF *AMICUS CURIAE*¹

Amicus curiae is the Reporters Committee for Freedom of the Press (the “Reporters Committee”), an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of journalists. As an organization that advocates on behalf of the news media, the Reporters Committee has a strong interest in ensuring that statutory provisions do not infringe upon the First Amendment-protected newsgathering rights of members of the news media, including photojournalists, or chill their willingness to gather information for the benefit of the public.

The statutes at issue in this case unconstitutionally curtail journalists’ ability to capture images and, thus, limit their ability to effectively report news stories of great public importance to their audiences. The impact of these statutes on breaking-news photography is particularly severe. Accordingly, the Reporters Committee submits this *amicus curiae* brief in support of Plaintiffs’ motion for summary judgment to urge this Court to declare the statutes unconstitutional.

¹ Pursuant to Rule 29(a)(4)(E), *amicus curiae* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION

At issue before the Court is (1) the appropriate level of constitutional scrutiny applicable to subsections of two statutes which “regulate protected speech under the First Amendment,” and (2) whether they “survive the appropriate review.” *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1192, 1197 (10th Cir. 2017). *Amicus curiae* the Reporters Committee writes to emphasize the effect on members of the news media—breaking-news photographers in particular—of the statutory provisions at issue. The Reporters Committee agrees with Plaintiffs that the provisions, which substantially burden the First Amendment-protected newsgathering rights of journalists, cannot survive constitutional scrutiny and, for the reasons set forth herein, urges the Court to grant Plaintiffs’ motion for summary judgment.

ARGUMENT

I. The Court should grant Plaintiffs’ motion for summary judgment; Sections 414 and 101 unconstitutionally burden the exercise of First Amendment rights, including those of journalists.

Plaintiffs are challenging portions of two statutes that impose heightened criminal punishment, Wyo. Stat. § 6-3-414 (“Section 414”), and civil liability, § 40-27-101 (“Section 101”), on an individual who “crosses private land to access adjacent or proximate land where he collects resource data,” if the individual neither owns the private land nor has obtained permission to cross it. Wyo. Stat.

§§ 6-3-414(c); 40-27-101(c). The term “collects” for purposes of Sections 414 and 101 is defined to mean: (1) “to take a sample of material” or “acquire, gather, photograph or otherwise preserve information in any form”; and (2) “recording . . . a legal description or geographical coordinates of the location of the collection.”

Wyo. Stat. §§ 6-3-414(e)(i); 40-27-101(h)(i). Thus, these provisions impose punishment on individuals who cross private land without permission if—and only if—they do so to create or engage in speech on “adjacent” or “proximate” land, even public land. Wyo. Stat. §§ 6-3-414(c); 40-27-101(c).

Journalists are not exempt from generally applicable laws, and they have no First Amendment right to trespass on private property. The statutes in question, however, are not generally applicable trespassing laws. Sections 414 and 101 heighten existing criminal and civil trespassing penalties for certain individuals engaged in First Amendment-protected activity, including photojournalists engaged in newsgathering. As such, as the Tenth Circuit concluded, the statutes “regulate protected speech under the First Amendment”; they “are not shielded from constitutional scrutiny merely because they touch upon access to private property.” *W. Watersheds Project v. Michael*, 869 F.3d at 1192.

The Reporters Committee agrees with Plaintiffs’ arguments that strict scrutiny should be applied to Sections 414 and 101, which regulate First Amendment-protected speech in a manner that is both content-based and viewpoint

discriminatory. *See* Pls.’ Mem. in Supp. of Mot. for Summ. J. 15–18, ECF No. 96. Strict scrutiny is designed to ensure that First Amendment freedoms have the robust protection from government regulation that is necessary for them to survive and flourish. *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405 (1963) (explaining that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity”); *see also Gray v. Udevitz*, 656 F.2d 588, 590 (10th Cir. 1981) (“The First Amendment is premised on the belief that free and open debate on public issues must be protected from government interference.”). It must be applied where, as here, statutory provisions “target the ‘creation’ of speech,” *W. Watersheds Project v. Michael*, 869 F.3d at 1196, and are not content and viewpoint neutral.

The Reporters Committee also agrees with Plaintiffs’ argument that, in any event, Sections 414 and 101 cannot survive any level of constitutional scrutiny—either strict or intermediate. The statutory provisions at issue, which substantially burden the First Amendment-protected newsgathering rights of journalists, are not “narrowly tailored to serve a significant governmental interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). The Reporters Committee writes to highlight for the Court the practical effect of the statutory provisions at issue on the

ability of journalists to gather news and, thus, to report on matters of public interest and concern.

A. Sections 414 and 101 impose severe restrictions on journalists, particularly on breaking-news photographers.

As the Tenth Circuit observed, the creation of speech—not just speech itself—is protected by the Constitution: “If the creation of speech did not warrant protection under the First Amendment, the government could bypass the Constitution by ‘simply proceed[ing] upstream and dam[ming] the source’ of speech.” *W. Watersheds Project* 869 F.Supp.3d at 1196 (quoting *Buehrle v. City of Key W.*, 813 F.3d 973, 977 (11th Cir. 2015)). The newsgathering activities of journalists, specifically, enjoy First Amendment protection. *See Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir. 1986) (“News gathering is an activity protected by the First Amendment.”); *see also CBS Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (“The protected right to publish the news would be of little value in the absence of sources from which to obtain it.”).

This Court has previously expressed skepticism that the statutory provisions at issue here are sufficiently burdensome for Plaintiffs to implicate their First Amendment rights. Plaintiffs, the Court previously posited, could do “research to determine their own location during, and en route to, such data collection activities” to avoid violating the new trespassing statutes. Order Granting Mot. to Dismiss, 14, July 6, 2016, ECF No. 64. Additionally, the Court noted that certain

of the Plaintiffs have acknowledged needing “to conduct surveys in the past to determine boundaries or rights-of-way.” *Id.*

Conducting a survey or doing other types of research of this kind would be extremely burdensome, if not impossible, for news photographers and other journalists assigned to cover breaking news events in Wyoming—including, for example, plane crashes, natural disasters, and wildlife events. *See, e.g.*, Angus M. Thuermer Jr., *Walton Controls Faulty*, Jackson Hole News & Guide, Nov. 2, 2006, <https://perma.cc/8A3J-SVHP> (featuring photographer Bradly J. Boner’s picture of the wreckage from a deadly plane crash in Grand Teton National Park); Brennan Linsley, *Wildfire Season*, Associated Press Images, Aug. 26, 2016, <https://perma.cc/7SZL-GHT4> (AP photograph of a wildfire off the shore of Jackson Lake in Grand Teton National Park); Mike Koshmrl, *Park: 399’s Cub Dead*, Jackson Hole News & Guide, June 20, 2016, <https://perma.cc/MP5L-A2R4> (featuring photographer Ryan Dorgan’s pictures of a traffic accident in Grand Teton National Park and of a bear cub). Journalists typically operate on tight deadlines and do not have the luxury of time; this is particularly true in the context of breaking news.

Among journalists affected by the statutory provisions at issue, photographers who regularly cover breaking news events are particularly exposed to civil and criminal liability. There is no question that photography is

“comfortably in the speech-creation category” protected by the First Amendment. *W. Watersheds Project*, 869 F.Supp.3d at 1196. And photojournalism unquestionably provides a public service by keeping Wyoming citizens informed about events in their state. However, breaking news photographers risk violating the statutes when they come onto public land to take photographs without fully vetting the ownership interests of roads or property they must cross to get there. Taking additional time to research routes to the scene of a breaking news event is simply not feasible or, at best, substantially increases the likelihood that the dramatic images the photograph is employed to capture will no longer be available once her or his research is complete. In other words, for the breaking news photographer, even short delays may mean getting to the right place at the wrong time. See Steven Davy, *Here’s the Image that was Voted 2016’s Best News Photo*, Public Radio International, Feb. 13, 2017, <https://bit.ly/2kqqVDh> (discussing how quick access—“You gotta be in the right place at the right time”—is critical to successful breaking news photography).

The heightened trespassing penalties imposed by these statutes would prevent and deter photographers from successfully pursuing breaking news stories—to the ultimate detriment of the public. Defendants acknowledge as much; they provide a laundry list of burdensome steps that they believe a reporter pursuing a breaking-news story could undertake to comply with the statutes at

issue. Defs.' Mem. in Supp. of Mot. for Summ. J. 14, ECF No. 99. Defendants misunderstand their burden under the First Amendment. By arguing that a journalist could conceivably find a way to continue to gather the news despite these onerous provisions, rather than demonstrating that the provisions are the least restrictive means to effectively achieve a compelling government interest (or narrowly tailored to serve a significant governmental interest), Defendants underscore that the statutes cannot survive any level of constitutional scrutiny.

B. Journalists should not be prohibited or discouraged from using geolocation as a reporting tool.

Even assuming a journalist could avoid liability by disabling geolocation features on his camera, that highlights how unreasonably burdensome these statutes are.² A reporter or photojournalist who captures a moment by snapping a photograph will necessarily want to record the place where that photograph was taken as accurately as possible.

Journalists have been early adopters of technological tools that allow them to utilize location data to improve their reporting. Such tools include the micro-blogging application Twitter and the photo-sharing application Instagram—both of which allow reporters to publish photographs and geographical coordinates

² As Plaintiffs have stated, even with the assistance of maps and GPS devices, they have legitimate concerns about erroneously entering private property and violating the statutes. Pls.' Mem. in Supp. of Mot. for Summ. J. 11, ECF No. 96.

simultaneously. See Alex York, *How to Use Instagram Geotag to Engage with Local Followers*, Sprout Social, Nov. 6, 2017, <https://perma.cc/DK8E-MGWD> (explaining that a post on Instagram can include “specific location, down to the latitude and longitude, of where you’ve stored your Instagram content.”). In 2015, a photographer published *The Geography of Poverty* using Instagram’s geolocation feature to chart a map of poverty across the U.S. with photographs corresponding to every stop on the map. Brennavan Sritharan, *Matt Black’s ‘Moral’ Photography of America’s Sprawling Poverty*, British Journal of Photography, Aug. 28, 2015, <https://perma.cc/ER9R-37WT> (describing Black’s brand of photojournalism as “a prime example of the possibilities that digital photography allows, bringing together imagery, geo-data and mapping to create an unassailable narrative”). In 2013, a CNN reporter used Twitter’s geolocation features to plot the course of a tornado that devastated parts of Oklahoma. John D. Sutter, *Walking the Path of a Tornado*, CNN, May 29, 2013, <https://perma.cc/DX3J-TH3Q> (posting photographs and snippets of interviews on Twitter while walking the 17-mile path of the tornado). For these reporters, geolocation data was a necessary and important component of their work; the statutes at issue here would prevent or deter journalism employing the same or similar methods in Wyoming.

CONCLUSION

Because the statutory provisions at issue unconstitutionally burden the First Amendment-protected newsgathering rights of journalists, the Reporters Committee respectfully urges the Court to grant Plaintiffs' motion for summary judgment.

Respectfully submitted on this the sixth day of June, 2018

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